SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~750~~ 26

NATIONAL LABOR RELATIONS BOARD

vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC AND POWER COMPANY.

BRIEF FOR THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

PAUL E. HADLICK,
WM. EARLE WHITE,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 759

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC AND POWER COMPANY.

BRIEF FOR THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

This case comes before the Court upon the petition of the Solicitor General, on behalf of the National Labor Relations Board for writs of certiorari to review two decrees of the United States Circuit Court of Appeals for the Fourth Circuit, entered on November 12, 1940, setting aside and refusing to enforce an order of the National Labor Relations Board issued against the Virginia Electric and Power Company on February 27, 1940. The

opinion of the Circuit Court of Appeals is reported in 115 F. (2d) 414, and is printed in Volume IV of the stipulated record, on pages 23 to 26. The decision and order of the National Labor Relations Board are reported in 20 N. L. R. B. No. 87, and are printed in Volume I of the stipulated record on pages 1 to 45. In this brief, references to the stipulated record will accord with the practice followed in the petition. Volumes I and II, which were printed as an appendix to the brief of Virginia Electric and Power Company, filed in the Circuit Court of Appeals, will be referred to as (P. A. I) and (P. A. II), respectively; Volume III which was printed as an appendix to the brief filed by the Board in the court below will be referred to as (B. A.), and Volume IV, containing the proceedings before the Circuit Court of Appeals, will be referred to as (Pro.). The typewritten transcript of evidence will be referred to as (Tr.).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10(e) and (f) of the National Labor Relations Act.

Statement of Facts.

In January, 1922, the union representing the transportation employees of Virginia Railway and Power Company, a predecessor of Virginia Electric and Power Company, called a strike. The strike failed. The employees in no other department of the Company participated in the strike (P. A. I., 363-364).

From 1922 to 1937 no labor organization represented employees of Virginia Railway and Power Company or Virginia Electric and Power Company in their dealings with their employer. In 1934, and in March 1937, efforts were made by organizers to interest the employees in join-

ing unions, which were not successful, although the Company offered no opposition except to stipulate that there should be no solicitation on Company time or property (P. A. I. 123-124, 150, 151, 152, 237, 238-239).

On April 12, 1937, this Court sustained the constitutionality of the National Labor Relations Act. On April 26, 1937, the Company posted the following notice (P. A. I. 15-16):

> "To Employees of the Company:
>
> "As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.
>
> "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

"This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually, or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed J. G. HOLTZCLAW,
President."

Several groups in Richmond and Norfolk, within the next three weeks, presented petitions for increased wages and improved working conditions (P. A. I. 17, 56-58). The Company sought to further clarify its position, and had its supervisory officers instruct the employees to select delegates to attend a meeting where a high company official would address them. On the evening of May 24, 1937, two meetings were held, described in the decision and order of the Board as follows (P. A. I. 17-20):

"At Richmond, Holtzclaw, and at Norfolk, R. J. Throckmorton, vice-president of the respondent's Norfolk operations, delivered the following address:

"A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.

"In a Company such as ours, if an individual operator for example should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

"This Company is willing to consider the requests mentioned above but feels that in fairness to all of its employees and to itself it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way and all interested groups should be represented in these discussions by representatives of their own choosing as provided in the Wagner National Labor Relations Act, which provides as follows:

" 'Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least

to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it'.

"In view of your requests to bargain directly with the Company and in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and advisors*, adopt your own by-laws and rules, and select your representatives to meet with the company officials whenever you desire.

"Holtzclaw added, at the conclusion of the quoted speech, that any wage increase granted by the respondent would become effective as of June 1, 1937; Throckmorton did not. As to all other material incidents the two meetings were substantially identical. Employees asking whether they had to join a labor organization and what kind of organization they should form were told they need join none and were refused advice as to the type of organization they should adopt. At the close of the respondent's direct participation in the meetings, the delegates were told they might, if they wished, remain and discuss the matter further. At both meetings, a substantial number of the delegates remained, decided to report the speech to their fellow employees, and agreed to meet for further discussions on June 1."

Within the next two or three days the representatives, acting on their own initiative, reported to meetings of their respective groups the message delivered by the manage-

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* Erroneously quoted as "supervisors" in the decision of the Board.

ment. These meetings were held on Company premises, and in some few instances during working hours, but in most instances the meetings were held at times when the men were not supposed to be on duty. (P. A. II. 722-723, 753, 811-812, 815, 820, 824, 833-834, 841-843, 917). In no case were supervisors present at these meetings. At most of these meetings the employees indicated their preference for an independent organization to represent them in dealing with the Company, and representatives were chosen by each group to act for them. (P. A. II. 659-668, 722-728, 796, 818-820, 841-842, 882-883, 893-894, 909-910.)

On June 1, 1937, meetings of these representatives met on company property, in Richmond, and in Norfolk, neither group knowing what the other was doing (P. A. II, 729-731, 779-780, 809-810, 844-845). At the Richmond meeting, a sub-committee was formed to ascertain what action employees in Norfolk were taking. This committee invited the Norfolk committee to meet with it in Petersburg. The meeting was held there on company premises on June 3rd (P. A. II, 797-800, 846-869; Bd. Ex. 19). At this meeting it was agreed to attempt a system-wide organization, and for that purpose to retain an attorney to draft a constitution. This was done on June 4th (P. A. II, 810-811, 868-871, 877-878).

During the ten days after the Petersburg meeting numerous meetings were held both in Richmond and in Norfolk for the purpose of hearing reports of the Petersburg meeting and the employment of counsel, and of considering the form of the draft constitution and by-laws when available. At least six of such meetings are shown by the record (P. A. I, 122-123, 440-441; P. A. II, 769, 771, 790, 791, 800-801, 814-815, 820-822, 846-847, 871-872, 900-902, 908). During the course of these meetings the draft constitution and by-laws were revised considerably (P. A. II, 810-811, 846-848), and a committee was appointed in Norfolk to meet with the Richmond representatives for changing and approving a

form of constitution, it being considered that a committee could function more efficiently than any large group.

On June 15th a joint meeting of the Norfolk and Richmond committees was held in the American Legion Hall, in Richmond, and the draft papers were read paragraph by paragraph and revised. As a result of protracted discussion, lasting over four hours, the committees approved the constitution and by-laws in their revised form together with a form of application for membership in the proposed organization. The next day the first two papers were mimeographed and the last printed (P. A. II, 848-851), Int. Exs. 36 and 37). These papers designated the name of the new association as "The Independent Organization of Employees", designated in the record as I. O. E.

The resulting constitution and by-laws were reported by the respective representatives to numerous groups of the men, for consideration, revision and ratification or rejection. Seven of these meetings are indicated by the record (P. A. II, 670-677, 715-716, 733-735, 781-783, 800-803, 888-889, 906-909, 1008-1010, 1043-1056). All of these meetings were called and conducted by the employees themselves and not on Company property. A majority in each meeting approved the papers.

Solicitation of membership in the I. O. E. began among the employees as soon as the membership cards were available, about June 18th. Generally, solicitors for the independent union did not solicit or sign membership cards on Company property or during working hours, but in some instances solicitation occurred in violation of the rule (P. A. I, 173-175, 204-209, 213-214; P. A. II, 676-679, 711-712, 731-733, 774-775, 824-825, 834-835, 903-904). On the other hand, A. F. of L. and C. I. O. organizers, and employees who were members of unions affiliated with those organizations, also discussed and solicited for those unions among the employees on Company property and during working hours

(P. A. I, 174-175, 194-196; P. A. II, 754-756, 775-776, 792-794, 803-804, 827-830, 896; Int. Ex. 21).

By July 12th, two thousand employees had signed applications for membership in the independent organization (P. A. II, 804, 821, 831-832, 878-879, 888-889). Transport Workers Union, a C. I. O. affiliate, had formed a local by this time, composed of transportation workers in Norfolk. International Brotherhood of Electrical Workers, an affiliate of A. F. of L., was active in soliciting members among electrical employees. Neither of these membership drives was very successful, as no substantial number of employees ever joined either of these unions. On July 17th, the independent group completed their organization, and formulated demands to be made of the Company (P. A. II, 684-686, 694-695, 741-745, 782, 804-805, 886-887; Int. Exs. 15-29), and on July 19th, these demands were presented and request for recognition was made. On July 30th, a meeting was held at which the Company recognized the Independent as exclusive bargaining agent of its employees upon being presented 2543 signed membership cards. Thereafter, in negotiations covering three days, a contract was agreed upon by the committees, which was later ratified by the employees and by the Company. This agreement was executed August 5, 1937 (P. A. II, 923-943; Bd. Ex. 9).

ARGUMENT.

While three questions are presented by the petition for writs of certiorari, only the first will be considered in this brief. That question is whether the National Labor Relations Board could validly find that Virginia Electric and Power Company violated Section 8 (2) and (1) with respect to the Independent Organization of Employees of Virginia Electric and Power Company on the basis of the message of the management to employees of the Company, delivered May 24, 1937.

The Board found (P. A. I, 21) "that at the May 24th meetings the respondent urged its employees to organize and to do so independently of 'outside' assistance, and that it thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The Circuit Court of Appeals held that there was no substantial evidence to support this finding of the Board (Pro. 31). It is contended that this decision is inconsistent with the principles laid down by this Court in the case of *National Labor Relations Board* v. *Link Belt Company* (No. 235-236, decided January 6, 1941; 61 S. C. 358), holding that an employer's known attitude toward unions is relevant in determining whether the employer dominated or interfered with an organization of its employees. It is argued that while the court below found that Virginia Electric and Power Company had been hostile to outside unions and that employees knew of this hostility, nevertheless, the court did not permit the Board to accord any weight to this circumstance in drawing its conclusions that the message of May 24, 1937, coerced its employees into forming an "inside union".

The Alleged Hostility of the Company to Unions is Without Significance.

The court below found that the Company had been opposed to the organization of its employees by an outside union prior to the passage of the National Labor Relations Act (Pro. 25). In the absence of any evidence that this past attitude had any effect on the action taken by the employees in forming the Independent union in this case, the relevancy of the past attitude of the employer is not established.

Certainly the decision of the Circuit Court of Appeals in this case is not inconsistent with the principles laid down by this Court in the *Link Belt* case. In the *Link Belt* case,

the Court found a condition created by the employer dissimilar in almost every respect from the present case.

In that case the Company had maintained for many years a company union which it continued to recognize until the so-called independent was formed. In this case there had never been a company union among employees of Virginia Electric and Power Company.

In the *Link Belt* case employees were discharged as late as 1936 for attempting to organize a labor union among employees. In this case, while it is now argued (Petition pp. 13-14) that the discharge of Everhard M. Mann, on June 1, 1937, was an act of the Company calculated to cause employees to join the independent, it is pertinent to observe that nowhere in the decision of the Board is any such charge made.

In the *Link Belt* case, supervisory employees actively solicited for the independent union on company time and company property. In this case, no case of supervisory solicitation is claimed to have occurred. As a matter of fact, the Company, on May 20th, and again on May 25th, 1937, gave careful instructions to all who held supervisory positions not to interfere, assist or attempt to advise or influence employees, in any way, regarding any choice or activity of organization (P. A. II. 305-307). In the *Link Belt* case, such instructions were issued only after the independent union had been organized, and had secured a majority in the plant.

The circumstances which this Court regarded as significant are summed up in the following quotation from the opinion (*National Labor Relations Board* v. *Link Belt Co.*, 312 U. S. —; 61 S. C. 358, at p. 365):—

> "The Board had the right to believe that the maintenance of the company union down to the date when Independent's membership drive was completed was not a mere coincidence. The circumstantial evidence

> makes credible the finding that complete freedom of choice on the part of the employees was effectively forestalled by maintenance of the company union by the employer until its abandonment would coincide with the recognition of Independent. The declared hostility towards an 'outside' union, the long practise of industrial espionage, the quick recognition of Independent, the support given Independent's membership drive by some of the supervisory staff, the prominence of company union representatives in that drive, the failure of the employer to wipe the slate clean and announce that the employees had a free choice, the belated instructions to the supervisory staff not to interfere—all corroborate the conclusion that the employer facilitated and aided the substitution of the union which it preferred for its old company union."

The hostility of employers to unions, openly expressed and implemented by the continued maintenance of a company union, the active interference of supervisory employees in the formation of a successor to the company union, and other acts taken at the time the employees were making a choice of their collective bargaining representative, is a relevant fact to be considered in determining employer domination, but mere opposition to unions before the passage of the National Labor Relations Act should not be considered such a relevant fact. Evidence of continued opposition after the Act, calculated to restrict the employees' freedom of choice, should be required. It is not the hostility but the effect upon employee freedom that is in issue.

In an attempt to bolster up this argument, the petition refers to certain actions of E. L. Bishop, Superintendent of Railway and Bus operators in Norfolk (Petition, p. 15). This leads to a consideration of another important distinction between the facts in the present case and those under consideration in the *Link Belt* case. In the *Link Belt* case, all employees worked in one plant; in the present case, em-

ployees are widely separated in different cities of Virginia and North Carolina. There is no evidence and there is no reasonable basis for an inference that Bishop's actions in the Norfolk Transportation Department, in Norfolk, could have had any effect on transportation employees of the Company in Richmond or in Petersburg. Bishop's department was only one of nine transportation departments of the Company (P. A. I. 473). Still less basis is there for an inference that it had any effect on employees in the Gas or Electric or Clerical Departments of the Company. The same thing is true as to the effect, if any, of the conduct of W. W. Edwards, who was a supervisor under Superintendent Bishop in the Norfolk Transportation Department. As a matter of fact, the employees in the Norfolk Transportation Department were the last to join The Independent Organization of Employees of Virginia Electric and Power Company, and, as was observed by the Circuit Court of Appeals in its opinion, the activity of Bishop "impeded rather than helped the organization of the association" (Pro. 33).

Circumstances in This Case Are Without Significance.

All the circumstances referred to by the Board in its decision and order were considered by the Circuit Court of Appeals, which came to the conclusion (Pro. 34):

> "There is nothing in any of these circumstances, or in all of them taken together, sufficient to support a finding that the company was giving aid or assistance to the association, or was interfering in any way with the organization of its employees or their free exercise of choice in the selection of bargaining representatives. It is only as they tend to establish such interference that such circumstances have any significance. In many cases, of course, they are very significant; but when the limited use of company property and facilities here shown is judged in the light of the record, we do

not think that it constitutes any substantial evidence upon which a finding of interference or domination could be predicated."

The court below was applying to the findings of the Board in this case the test of whether they were supported by substantial evidence, as that term was defined by this Court in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, p. 229, where it was said:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

While it is realized that in a brief such as this no complete argument on the merits of the case is in order, nevertheless, it is felt that in order to properly pass upon the petition for writs of certiorari, the Court should be presented a fair picture of what took place between May 24th and August 5th, 1937, so far as these facts relate to the organization of the independent union. The circumstances relied upon in the petition should be placed in proper perspective to avoid the distorted picture painted there.

The Board lists the following facts which it regards as constituting unfair labor practices (P. A. I, 25):

> (1) Meetings of committees of employees were held on Company premises for the purpose of forming an independent system-wide organization.
>
> (2) Bulletin boards of the Company were used for posting notices of these meetings.
>
> (3) Telephone connections of the Company were used by committeemen to communicate with each other.
>
> (4) There was widespread solicitation by I. O. E. on Company premises.
>
> (5) The I. O. E. was completely organized and had a majority of the employees as members within six weeks after the meeting of May 24th.

The Meetings of Employees on Company Premises.

The Board finds that meetings of the employees were held upon the premises for the purpose of forming an independent system-wide organization. It is perfectly clear that meetings were held on Company premises. The meetings held prior to June 1, 1937, were, without exception, meetings called for the purpose of hearing reports of representatives who attended the meeting of May 24th. At these meetings, so far as the evidence shows, when any action was taken at all, it was taken to ascertain by various means what the employees in the group wanted to do. At Cove Street, in Norfolk, there was a secret ballot (P. A. II, 660). At the Service Building, in Richmond, apparently the men voted openly (P. A. II, 842). At Reeves Avenue, the generating plant, in Norfolk, the vote was open (P. A. II, 820). At Twelfth Street, the generating plant in Richmond, the ballot was not even taken on Company premises, but was a secret ballot collected at the homes of the employees (P. A. II, 883). The Gas Department and the shops are covered under the stipulation that the meetings there were similar to the meetings held at Cove Street (P. A. II, 908). All of these meetings had one thing in common—the employees everywhere voted their choice in favor of an independent organization as against C. I. O., A. F. of L., and no organization. They were given their choice, so far as the evidence discloses, without any suggestion, interference, or supervision from the Company.

It is obvious that these meetings were not held "for the purpose of forming a system-wide independent organization". The Transportation employees in Norfolk voted to form the "Employees Association of Committees", under the leadership of Elliott (P. A. II, 902), and the Transportation employees in Richmond voted to form their

own organization, and immediately rented their own quarters, and never held any further meetings on Company premises (P. A. II, 909-910).

There was no communication between employees in Norfolk and in Richmond until after June 1, 1937 (P. A. II, 809-810). All meetings up until that time were of groups of similarly employed men in a single division. Clearly no system-wide organization had been generally contemplated. On June 1st, there was a meeting in Richmond, called by Holzbach, of representatives of various Richmond groups, and this meeting was held on Company premises, but not during working hours. Here, for the first time, a system-wide organization was discussed, and a committee was appointed to find out what employees in Norfolk were doing, and to get a lawyer to draw up a tentative constitution for a system-wide independent organization. No form of organization was determined (P. A. II, 845).

On June 1, 1937, representatives of various groups met in Norfolk on Company premises, but not during working hours, and heard Elliott explain his proposed "Employees Association of Committees". The meeting took no action except to direct that the proposal be printed and distributed to the representatives. No action was taken looking to the formation of any organization (P. A. II, 729-731).

On June 3rd, a meeting of representatives from Norfolk and Richmond was held in Petersburg on Company premises, but not during working hours, at which nothing was agreed upon, except that a lawyer would be retained to draw up a constitution and by-laws. There was no definite idea of what sort of organization would be set up, or whether the groups would approve anything (P. A. II, 799, 869-870).

On June 7, 1937, representatives of different departments met in the Service Building, in Richmond, again at night, and discussed changes to the proposed constitution and by-

laws, submitted by the attorney (Int. Ex. No. 35; P. A. II, 846).

On June 9, 1937, a special meeting was called in the Company Y. M. C. A., at the car barns on 18th Street, in Norfolk, of bus and street car operators. The meeting was attended by Underwood, from Richmond, at Tatem's request, to try to persuade these men to join in the efforts to form a system-wide organization (P. A. II, 871, 901). The meeting, however, decided to adopt Elliott's E. A. C. plan, and form a separate organization of transportation workers (P. A. II, 902). Over a period of time, ending July 11th or 12th, applications were signed by 115 men, which was less than a majority of the group (Tr. 5132).

On June 11, 1937, a second meeting was held in Norfolk by representatives of various groups sponsoring the system-wide organization (Int. Ex. 6; Tr. 3721). The Norfolk transportation representatives still refused to participate. The proposed constitution was discussed (P. A. II, 800).

On June 14, 1937, a group met in Norfolk, consisting of operators at the Reeves Avenue Power Plant. The meeting was held in the auditorium at the power plant which was a room that the employees themselves had furnished. The group considered the proposed form of constitution and voted to oppose the provision for a check-off (Int. Ex. 31; P. A. II, 1034-1035).

Minutes of all these meetings are set forth in the stipulated record (P. A. II, 1001-1070).

It is stipulated that no meetings were held on Company property by employees or representatives attempting to form the independent union subsequent to June 14, 1937 (Tr. 5238).

The meetings beginning with June 1, 1937, were held at night, and there is no evidence that the Company had any knowledge of them.

The employees took action to find out what a majority of them wanted. Four choices were usually presented: C. I. O., A. F. of L., independent union, or no union. The very fact that these choices were presented indicates that the employees themselves felt that they were free to do as they chose. The fact that these meetings were held on Company premises must be shown to have some relation to the choice made by the employees of an independent union. Unless such a connection is established, the fact that the meetings were held on Company premises is totally irrelevant.

The Organization of the Independent Union.

The constitution, as originally prepared, was submitted to a joint meeting of committee members from Norfolk and Richmond, held at the American Legion Hall, in Richmond. After extensive modification, it was adopted by those present (Int. Ex. 22; P. A. II., 847, 1027-1033). This did not bind any employees to become members of the proposed organization. The men present merely agreed to take the constitution and by-laws as finally approved, and present them to their fellow-employees. The I. O. E. was a plan that employees could accept if they wanted it; otherwise, it would amount to nothing. The constitution was the work of the representatives of employees, embodying the principles that those men believed accorded with the desires of their constituents.

The I. O. E. could never have been organized, had it not been the almost unanimous desire of the employees. The Constitution of I. O. E. provides for a federation of four unions based on the kind of work in which employees are engaged. There are four divisions, the Transportation, the Electric, the Gas, and the Accounting, General Office and Sales. These divisions, in turn, are divided into voting sections according to the employees' particular type of em-

ployment. Employees in the Norfolk division of the Company are in separate voting sections from those in the Richmond division. The Gas Division, located in Norfolk, naturally has no Richmond voting sections.

There are a total of twenty-seven voting sections. Members of each voting section elect a representative to the appropriate Division Committee. Members of each Division Committee, in turn, elect two of their number to the General Committee of I. O. E., one member from Norfolk and one from Richmond, except in the case of the Gas Division which elects two members from Norfolk. In addition to this, all the Division Committee members in Richmond, acting as an Interdepartmental Committee, elect one member-at-large to the General Committee, and the same procedure is followed in Norfolk (Bd. Ex. 36; P. A. II., 950-968). Voting sections annually hold a primary by secret ballot to nominate candidates for election to Division Committees. Those receiving the largest and second largest number of nominating ballots are the candidates, and from these two the representatives of each voting section to the Division Committee is chosen by secret ballot.

This brief description is given to demonstrate how difficult it would be for the Company to dominate the administration of I. O. E., even should it wish to do so. Nomination by secret ballot is designed to bring out the men most desired by their fellow-employees. From the two most acceptable, the representative is chosen by secret ballot, with elaborate safeguards against any effort to control the election. The man the majority of the employees want for representative is bound to win. The right to recall a representative is provided, so in case an employee was dominated by the employer, he could be replaced.

The I. O. E. was accepted by the vast majority of the employees. The applications for membership were not generally distributed until June 21st (P. A. II., 850). On July

2nd, the primary elections were held to nominate candidates for representatives to the Division Committees. This was only seventeen days after the meeting at the American Legion Hall, and just two weeks after employees had their first opportunity to join I. O. E. The Board does not mention it in its decision, but it is in the record and not denied that 1912 employees voted in this primary election (Int. Ex. 25; Tr. 4372). There were approximately 2800 employees eligible for membership in the I. O. E. Within two weeks, I. O. E. had signed up more than two-thirds of the employees, and of these, 1912 actually participated in the selection of candidates by making out nomination ballots which required them to write in the name of the man they wanted to represent them. It is unreasonable to infer that a group of twenty-five or thirty men could persuade approximately 2000 fellow-employees, divided into small groups over most of eastern Virginia and northeastern North Carolina, to take the trouble to vote in an election unless those men were actively interested in the project. It is perhaps conceivable that a small group could impose an employee representation plan on a large but indifferent mass of employees where all that was required was the acquiescence of silence. Here active participation was required and positive approval was necessary.

With the election of representatives to the Division Committees, on July 12th, in which election 1885 members participated (Int. Ex. 26., Tr. 4372), the formation of I. O. E. was completed. Thereafter, the various committees met and completed their organization as provided in the constitution. I. O. E. was by this time the voluntary choice of approximately 2500 employees.

Five days after the election of representatives on July 12th, all of them met at Ocean View. Between July 12th and July 17th, these men had canvassed their respective voting sections to ascertain the wishes of the men as to de-

mands to be made upon the Company. At the meeting at Ocean View, which lasted two days, these demands were discussed, revised and formulated into a proposed contract. The minutes of the meeting are in the record (Int. Exs. 16 A-F; P. A. II., 1016-1024), as is the draft of proposed contract (Bd. Ex. 8; Tr. 76). Examination of this proposed contract shows much more than requests for an increase in pay. Overtime payments, a limit to the work week, seniority rules, vacations, improved working conditions, a check-off, a closed shop, arbitration of disputes according to an elaborate procedure, were requested along with wage increases, which, if granted, would have increased the company pay-roll by over a million dollars a year.

Thereafter, Underwood, who had been elected chairman of the General Committee of I. O. E., presented the proposal to Mr. Holtzclaw, President of the Company, with a letter requesting a conference and demanding recognition of I. O. E. (P. A. II., 919). Pursuant to this request, a meeting was arranged for July 30th, at which time the General Committee of I. O. E. met representatives of the management in Richmond.

It is conceded that I. O. E. brought to that meeting 2543 signed applications for membership, to which were attached separately executed pay assignments of the employees, directing the Company to deduct from their wages their dues to I. O. E. These cards were checked by the Company (P. A. II., 745). There is no contention that these membership cards were invalid, nor is any claim made that they were not signed voluntarily.

The contract, finally negotiated, appears in the record (Bd. Ex. 9, P. A. II., 923). Not only a substantial wage increase but seniority rights, overtime pay at time and a half, maximum hours, and arbitration of grievances, none of which had been ever before granted employees, were finally incorporated in the agreement. To infer that the

men who negotiated this contract for the employees felt that they were acting at the suggestion of the Company, or were laboring under the fear of reprisal if they incurred its displeasure, is ridiculous.

Even with this fairly successful outcome, the members of the Division Committees, who had to approve the contract before it could become effective, went back to their voting sections and ascertained the views of their members (P. A. II., 705, 835).

In the Transportation Department, in Norfolk, which was the last important group to join I. O. E., the representative of those men made them sign a written consent to accept the contract (P. A. II., 905). These consents were signed by 324 men, much more than a majority of that group.

After the contract was signed, the I. O. E. did not just drift along. It promptly organized Grievance Committees, and the record shows a large number of grievances handled (Int. Ex. 1; Resp. Ex. 8; Tr. 845, 3660). The Board, in its opinion, does not mention these, but perhaps it chose to disregard this evidence which showed the absence of Company domination.

These facts, uncontradicted and fully supported by the record, are related to show that no inference of Company domination or coercion is justified in the light of the action the employees took. The circumstance of initial meetings on Company premises, when considered in connection with what employees then did, and their actions thereafter, cannot be considered as sufficient to furnish the basis of an inference that these men felt that they were receiving any approval or encouragement from the Company. During the period from June 15th to July 12th, when the first elections were held, the employees all had the opportunity to freely consider their choice between the independent and the outside unions which were actively soliciting their support with no opposition or interference on the part of the Com-

pany. Witnesses were introduced by the Board who preferred the outside organizations. None testified to coercion, intimidation or interference on the part of the Company.

Use of Bulletin Boards and Telephones.

The Court in its opinion (Pro. 34) calls attention to the fact that only one instance of the use of a Company bulletin board is established, and that the case where Holzbach posted a notice of his meeting of May 26th (P. A. II., 897).

The use of telephones by Tatem, Jones and Underwood can certainly be no basis of a finding of Company support or domination. These men had access to the telephone in regular line of duty. Their use of the line is without significance unless it indicated Company approval of what they were doing. The Circuit Court of Appeals disposes of this contention with the flat statement (Pro. 33-34): "The use of the company telephone in communications between employees in Richmond and Norfolk was without the knowledge of supervisory employees."

Solicitation on Company Premises.

The charge is made that there was "widespread solicitation on the premises" of the Company by I. O. E. There is no evidence to support this finding. Assuming that the Board has a right to refuse to credit the testimony of the large number of witnesses who testified that there was very little solicitation on Company premises, still there must be something in the record that a reasonable mind might accept as adequate to support a conclusion such as the Board has drawn. Counsel have examined the record with some care, and venture the assertion that with the exception of the witnesses, Harrell and Judge, no witness testified that there was any solicitation on Company premises prior to August 5, 1937, when the Company had already recognized

the I. O. E. as the exclusive bargaining agent for its members, and entered into a written contract with it. There was some evidence that after August 5th, and within the ninety-day period given employees to join I. O. E., under the provisions of the contract, there was some solicitation on Company premises, but I. O. E. was already organized, recognized and functioning, and it is only reasonable to infer that the solicitation that took place arose from a desire of I. O. E. representatives to see that the few remaining non-member employees were given every chance to join. Certainly such solicitation is no basis for the inference that the original choice of employees to form an independent union could have been influenced by it.

Johnny Judge (P. A. I., 204) did testify that it was a general practice, but could give only three instances (P. A. II., 205-209). Harrell testified (P. A. I., 213-214) that he was solicited on Company property, but not on Company time, and that he signed up out in the street. Even Staunton, the man who preferred to be fired rather than join I. O. E., testified (Tr. 967) that he wouldn't say whether solicitation he saw on Company premises was before or after August 5th. The claim of "widespread solicitation on Company premises" is not supported by this evidence.

But even if there was solicitation by I. O. E. campaigners on Company premises, without objection from the Company, the same sort of solicitation was being indulged in by Mr. Latham and his employee assistants of the I. B. E. W., without objection from the Company. Six witnesses testified to this. Tatem (P. A. II., 803), Crockett (P. A. II., 828), Brown (P. A. II., 775-776), Morris (P. A. II., 7930794), Faust (P. A. II., 713), and Wallace (P. A. II., 827) all testified to solicitation by the men who favored I. B. E. W., and that such solicitation was during working hours as well as on Company premises.

The Period Required to Organize the Independent Union.

The other circumstance relied upon by the Board was the asserted speed with which the employees set up their independent organization. The inference is that this could not have been accomplished without Company approval. The court below held this inference to have no basis in facts which appear of record (Pro. 32-33). What was done, and how it was done appears in great detail. The men who led the movement to set up the independent union and those who opposed it all testified. The Board had made an exhaustive examination of the minutes and records of the independent organization before the hearing was held. It is significant that no facts are pointed out to support the conclusion that the Company assisted or encouraged the organization in any way or that those opposing the organization were made to feel that the Company disapproved their actions. The position of the Board is that it is incredible that laboring men, free from employer interference, would voluntarily choose an unaffiliated labor organization when granted an opportunity of joining unions affiliated with A. F. of L. or C. I. O. The right of employees to form, join or support an "inside" union apparently belongs only in the realm of theory and will never be exercised. The fact that employees promptly and almost unanimously choose an "inside" union is the basis of a Board inference of Company domination or interference. According to such reasoning this Court stated an impossibility when it said (*National Labor Relations Board* v. *Link Belt Co.*, 61 S. C. 358, at pp. 360-361):

> "An 'inside' union, as well as an 'outside' union may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by Section 7 of the Act."

If the fact that employees form their own collective bargaining agency and act with efficiency and dispatch is to be the basis of an inference of Company sponsorship and interference, then the door is effectively closed to the organization of "inside" organizations. Any degree of unanimity is in itself a suspicious circumstance. The better the inside union works and the more support it has from the employees it represents, the more evidence it furnishes the Board that subtle influences are at work by which the employer is interfering with the freedom of choice of the employees.

Summary and Conclusion.

The sole issue in this case is one of fact. There are no principles applied by the Court below that have not already received the approval of this Court. The issue was whether there was substantial evidence to support the finding of the Board that the Company had dominated and interfered with the formation and administration of the I. O. E. The Court followed the definition of domination and interference given by this Court in the case of *T. & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 568. It applied to the evidence the test of substantial evidence in accordance with the principles laid down by this Court in the case of *Consolidated Edison Company of New York* v. *National Labor Relations Board*, 303 U. S. 197, 229) that requires that substantial evidence must be "such relevant evidence as a reasonable mind must accept as adequate to support a conclusion". Noting the absence of any evidence of any manifestation of hostility by the Company towards any outside unions (Pro. 31) or any suggestion that "the company through its supervisory employees, or otherwise, aided or assisted in any way" in the organization of I. O. E., the Court below found that there was no substantial evidence to support the finding of the Board.

No principles were followed contrary to those laid down by the decisions of this Court. The facts in the case of *National Labor Relations Board* v. *Link Belt Co.*, (*supra*) are so dissimilar to the facts in the case at bar that it is impossible to point out any principles established by that case that are in any way violated by the decision of this case.

No decisions of any other of the Circuit Courts of Appeals that conflict with the decision in this case are pointed out in the petition.

Finally the statement in the petition (P. 28) that "The decision of the Court below with respect to what conduct by employers constitutes interference with and support of a labor organization * * * raises a question of public importance concerning enforcement of the National Labor Relations Act" cannot be supported. A similar statement could be made whenever a Circuit Court of Appeals fails to find substantial evidence to support conclusions of the Board. It is difficult to conceive of any new principles that this Court could establish by a consideration of this case with respect to the powers of the Board or the duties of employers.

For these reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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